

1975

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Recommended Citation

Margaret E. Taylor, *Judicial Review of Adoption Agency Decisions*, 25 Case W. Res. L. Rev. 650 (1975)

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Note

JUDICIAL REVIEW OF ADOPTION AGENCY DECISIONS

Adoption agency consent is a prerequisite to court approval of adoption petitions in many jurisdictions, by virtue of either express statutory language or judicial interpretation. Since the courts in these states have no power to review agency denials of approval, the agencies are left with final, unsupervised control over the last stage of the adoption process. After criticizing the various rationales that have led to this result, the author discusses the theoretical and practical reasons for giving adoption petitioners the opportunity to challenge agency decisions in court.

I. INTRODUCTION

FROM A PROCESS dating to ancient times designed to provide an heir,¹ adoption has evolved into a major program in the care of unwanted and orphaned children and today affects the lives of a large number of people each year.² The increase in the numbers of children involved has vastly expanded the role of the adoption agency, with results that are not entirely satisfactory. Extensive

1. Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 745 (1956). Adoption was unknown at English common law, so until about 1850 Louisiana and Texas, with their civil law backgrounds, were the only jurisdictions allowing formal adoption. *Id.* at 747. The other states began to pass adoption statutes during the latter part of the eighteenth century and were inspired from the start by humanitarian concern for orphaned children. *Id.* at 749. See also Kuhlmann, *Interstate Succession By and From the Adopted Child*, 28 WASH. U.L.Q. 221 (1943).

2. Adoptions increased from 96,000 in 1958 to 175,000 in 1970. Comment, *A Reconsideration of the Religious Element in Adoption*, 56 CORNELL L. REV. 780, 781-82 n.10 (1970); WELFARE, SOCIAL AND REHABILITATIVE SERVICE, NATIONAL CENTER FOR SOCIAL STATISTICS, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, ADOPTIONS IN 1971, at 1 (1972). The indications are, however, that the number of adoptions is now decreasing because of the drop in the supply of desired children. WELFARE, SOCIAL AND REHABILITATIVE SERVICE, NATIONAL CENTER FOR SOCIAL STATISTICS, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, ADOPTIONS IN 1971, at 1 (1973). Legalization of abortion, increased use of birth control, and the trend toward unwed mothers keeping their children are among the prime factors creating this situation. Barbour, *It Took Them Four Years to be Instant Parents*, Miami Herald, Mar. 17, 1974, at 9-F, col. 1.

coverage by the media of several notorious decisions³ and of the black market for babies⁴ has resulted in a public awareness that is conducive to a reevaluation and reordering of the interrelation of the courts and the agencies in the adoption process. One of the most critical elements to be examined is the extent to which adoption agencies dominate⁵ the process. The agencies contend that by virtue of their expertise, they are best qualified to make the final decision whether to approve an adoption. Some courts have taken the position that as the forum granted subject matter jurisdiction over adoption by statute⁶ and as impartial observers, they should be the final arbiters. The importance of resolving this conflict is accentuated by the expanded role that the agencies now play⁷ and by the efforts agencies are making to become the only legal conduit through which children can be adopted.⁸

3. N.Y. Times, Nov. 11, 1971, at 46, col. 5; N.Y. Times, Nov. 15, 1972, at 46, col. 4; NEWSWEEK, June 7, 1972, at 118; LIFE, June 11, 1971, at 34-36.

4. Wall St. J., Sept. 14, 1971, at 1, col. 4; Barbour, *supra* note 2.

5. Adoption agencies are of two varieties: the public agencies, which are run by the state, usually through the Department of Public Welfare, and the private agencies, which are run by religious or nonsectarian charitable organizations.

6. The court-granted jurisdiction over adoption matters varies from state to state. In a few states, courts of general jurisdiction have authority. *E.g.*, CAL. CIV. CODE § 226 (Cum. Supp. 1974); FLA. STAT. ANN. § 63.102 (Cum. Supp. 1974); IOWA CODE ANN. § 600.1 (Cum. Supp. 1974). The more usual pattern places jurisdiction in a specialized court such as the probate court. *E.g.*, CONN. GEN. STAT. ANN. P.A. 73-156 (App. 1974); MICH. COMP. LAWS ANN. § 710.1 (Cum. Supp. 1974); OHIO REV. CODE ANN. § 3107.02 (Page 1972). Less frequent is the establishment of special juvenile or domestic relations courts. *E.g.*, COLO. REV. STAT. ANN. § 22-1-2 (1964).

7. In 1958, there were 27,000 agency placement adoptions and by 1970 this number had increased to 69,600. Comment, *A Reconsideration of the Religious Element in Adoption*, 56 CORNELL L. REV. 780, 781-82 n.10 (1970); ADOPTIONS IN 1970, *supra* note 2, at 1. Agencies are a necessary part of the adoption process even when they are not custodians of the child. Often they conduct investigations of prospective parents for courts when courts assume custody. H. CLARK, DOMESTIC RELATIONS 616-18 (1968) [hereinafter cited as CLARK].

8. Hauser, *Adoption and Religious Control*, 54 A.B.A.J. 771, 773 (1968). In a majority of states, adoption may be effected either through agency or private placement. In agency placement, the child is placed with a family that has been carefully screened and approved by the agency. Under the private placement method, the natural and adoptive parents, often working in conjunction with a lawyer or doctor, place the child directly. A number of adoptions take place entirely within the family of the child. The parents place the child with other family members, or relatives take the child when the parents die. These adoptions generally produce little dissent, and in some states there are more expeditious procedures for these adoptions. CLARK 638-40.

The adoption process begins when an agency acquires custody of a child through either the natural parents' voluntary release of the child to a designated agency or the judicial commitment of the child to an agency. The agency then seeks to place the child in a suitable adoptive home. The prospective parents, after a specified period of time set by statute, file a petition with the appropriate court to have the adoption decreed. It is at this stage of the process that the issue of authority must be resolved: Is agency consent a prerequisite to the judicial granting of an adoption petition? A necessary corollary to this question is whether a court is permitted to undertake a *de novo* investigation of the facts upon which the initial agency determination is based.

Although the question of judicial review of rejected adoption petitions has arisen in diverse circumstances, two particular fact situations appear with great regularity. In the first situation, the agency decides a particular placement is not advantageous after the child has been living on a conditional basis with the prospective adoptive parents for a time.⁹ The second common fact pattern occurs when foster parents who initially assumed custody with no thoughts of permanent adoption become attached to the child after having had custody of the child for a considerable period.¹⁰ In

9. It is difficult to isolate the factors that may convince an adoption agency that a family conditionally accepted as adoptive parents is not "right" for the child. The caseworker may discover new data about the child or about the prospective parents which places a new light on the adoption. Investigation of the parents is an ongoing process during the placement period. Changes in the family situation of the candidate parents, such as death or marital discord, are closely scrutinized. Moreover, particular care is exercised by the agency when the placement involves an infant.

10. Whether to permit foster parents to adopt at all is a particularly troublesome area of adoption. There are several additional variables to consider where there has not been an unconditional release of custody to the agency that placed the child in the foster home. The natural parents may withhold their consent to release the child for adoption, or the child may develop some actual handicap or suspected handicap during his tenure with the foster parents. Pearlman, *Foster Parent Rights in Connecticut*, 5 CONN. L. REV. 36, 37-38 (1972). Quite naturally the emotional attachments between foster parents and the child develop in the period of custody. Thus, a long placement puts both the foster parents and the child in an extremely vulnerable position. The foster parents are expected to provide a normal homelife for the foster child and yet to be willing to surrender the child upon short notice. Katz, *Legal Aspects of Foster Care*, 5 FAMILY L.Q. 283, 301 (1971). For the foster parent, such a separation is, of course, traumatic. For the child, the adjustment is more difficult. The child's conduct follows a predictable pattern, moving from protest to despair and finally to detachment, a phenomenon child psychologists refer to as the Bowley-Patterson syndrome. Pearlman, *supra* at 38-39.

both cases the prospective parents, in an effort to keep the child, file the petition for adoption in the face of agency opposition.

II. THE STATUTES

An examination of the availability of judicial review of agency decisions necessarily begins by focusing on statutory law since no formal adoption process existed at common law.¹¹ Adoption statutes that deal with authority over the adoption process are of three basic types. There is no difficulty with interpretation of the first group of statutes, which expressly provide for judicial review of agency determinations or review upon agency disapproval (effectively the same for most purposes).¹² Problems have arisen, how-

When the foster parents are not suitable parents, the decision not to grant the adoption petition is, of course, justifiable. However, at times the decision to reject the petition of foster parents is made solely because it is felt that the foster parents have used the foster-parent program to bootstrap their way to permanent adoption, since foster parents generally do not meet the strict requirements established by the agency for the purpose of screening applicants for adoptive parents. But by virtue of the length of time they have the child in their home, and the emotional bond formed in that period, foster parents build a substantial case in their favor. Since subsequent separation may cause trauma, approval of the adoption petition by the agency or court is consistent with the child's emotional welfare. See Note, *The Rights of Foster Parents to the Children in Their Care*, 50 CHI.-KENT L. REV. 86, 97 (1973).

Nevertheless, allowing large numbers of people to circumvent the adoption procedure by becoming foster parents could subvert the entire foster-parent program. Agencies might refuse to use foster homes if the foster-parent program were consistently used to evade the qualifications established by the agencies. See *In re Adoption of Reinius*, 55 Wash. 2d 117, 120 n.2, 346 P.2d 672, 673 n.1 (1959). *Contra*, *Mary I. v. Sisters of Mercy*, 200 Misc. 115, 104 N.Y.S.2d 939 (Sup. Ct. 1951). The result of such a trend would be the continued institutionalization of the children.

Legislation reflects the tensions between the two views. In New York, foster parents who have held custody of a child for a period of 2 years or more are granted certain privileges when they file adoption petitions. N.Y. DOM. REL. LAW § 111(4) (McKinney Cum. Supp. 1974). California reflects the opposite position, granting preferences to the non-foster-parent applicant over the foster parent. CAL. CIV. CODE § 224n (West Cum. Supp. 1974); see *In re Adoption of Runyon*, 268 Cal. App. 2d 918, 74 Cal. Rptr. 514 (Ct. App. 1969). Comment, *The Foster Parent Dilemma "Who Can I Turn to When Somebody Needs Me?"*, 11 SAN DIEGO L. REV. 376, 394-406 (1974), contains a more complete treatment of the contrasting approaches to the foster-parent program.

11. CLARK 603.

12. A number of states now have provisions expressly allowing the courts to dispense with agency consent upon either hearing or consideration of written reasons for disapproval. ARIZ. REV. STAT. ANN. §§ 8-106(A)(3), (C) (1974); DEL. CODE ANN. tit. 13, § 905 (Cum. Supp. 1970); HAWAII REV. STAT. tit. 31, §§ 578-2(a)(3), (b)(6) (Supp. 1974); KY. REV. STAT. ANN. § 199.473

ever, with the other two groups. The second group provides that an adoption agency "may consent to a petition."¹³ The plain mean-

(2) (1973); MD. ANN. CODE art. 16, § 74 (Michie 1973); MASS. GEN. LAWS ANN. ch. 210, § 2A(E) (1958); N.M. STAT. ANN. § 22-2-26(F) (Supp. 1973); N.D. CENT. CODE § 14-15-06(h) (1971); PA. STAT. ANN. tit. 1, §§ 411, 413 (Cum. Supp. 1974); TEX. FAM. CODE ANN. tit. 2, § 16.05 (1975); VA. CODE ANN. § 63.1-225 (Cum. Supp. 1974); WASH. REV. CODE ANN. § 26.32.030(5) (Supp. 1973); WIS. STAT. ANN. § 48.85 (Cum. Supp. 1974); cf. CAL. CIV. CODE § 224n (West Cum. Supp. 1974), which provides that agency determinations on the applications of adoptive parents who are not foster parents may be reviewed and overturned by the courts, *construed in Adoption of McDonald*, 43 Cal. 2d 447, 274 P.2d 860 (1954); MO. STAT. ANN. § 453.020-.030 (Cum. Supp. 1975), makes no reference to agency consent but does state that in all cases court approval is required. Furthermore, in a later section, § 453.070(2), it is provided that foster parents who have had the child for 18 months are entitled to preference from the agency in adopting the child but final discretion is in the court.

It should be noted that providing for judicial review by statute does not necessarily mean the courts will liberally reverse agency determinations. *Malpass v. Morgan*, 213 Va. 393, 192 S.E.2d 794 (1972), has placed a very strict interpretation on the court's power to dispense with consent. In this case the mother had remarried and her new husband was attempting to adopt her son by a former marriage. The natural father, who had been granted visitation rights under the divorce decree, had maintained a relationship with the child and refused to consent to the adoption. The fact that it was the natural parent refusing consent doubtless had some effect on the court's outlook. But speaking generally about the statute, the court held that a finding alone that the child's best interests lay with the adoption was not enough to justify waiving consent. The court reasoned that otherwise the section granting judicial review to determine the best interests would make the consent provisions, which include one applicable to agencies, irrelevant and that the legislature could not have intended that result. *Id.* at 393, 192 S.E.2d at 798.

13. ORE. REV. STAT. tit. 11, §§ 109.316(1), (2) (1973): "(1) The Children's Services Division or an approved child-caring agency of this state, acting in loco parentis, may consent to the adoption of a child."

Other states with statutes that merely empower the agency to consent without making clear whether that consent is essential are the following: ALA. CODE tit. 27, § 3 (Cum. Supp. 1974); ARK. STAT. ANN. §§ 56-106, -120 (1971); CONN. GEN. STAT. ANN. P.A. 73-156, § 10 (App. 1974); ME. REV. STAT. ANN. tit. 19, § 532 (Cum. Supp. 1974) (the Maine statute is peculiar in that it states "shall consent" when the child has been committed to the agency and "may consent" when the child has been released to the agency by his parents); MINN. STAT. ANN. § 259.24(1)(f) (1971); MISS. CODE ANN. § 93-17-5 (1972); NEV. REV. STAT. tit. 11, § 127.050 (1973); S.D. COMPILED LAWS ANN. § 26-6-21 (1967); W. VA. CODE ANN. § 49-3-1 (Cum. Supp. 1974). Cf. FLA. STAT. ANN. § 63.081(1) (1969):

(1) . . . but if the child has previously been permanently committed to a licensed child-placing agency or the state department of public welfare, the consent of the parent or parents or legal guardian is not required and the consent may be given by the licensed child-placing agency or the state department of public welfare to which the child has been so committed and this consent is sufficient.

Louisiana's adoption statute, LA. REV. STAT. § 9:422 (1965), makes no mention of the issue of agency consent.

ing doctrine¹⁴ offers little assistance in the effort to establish a predictable standard. The response of some courts, therefore, has been to resort to legislative intent. Not surprisingly, the results have been varied. Other courts have concluded that the mechanical use of the rules of statutory construction dictates that agency consent be a prerequisite to the approval of an adoption petition.¹⁵ Still others have examined the nature of the adoption process and have implied a judicial prerogative to review agency decisions.¹⁶

The third group of statutes presents no obvious need to look beyond the mandatory words of the statute. This group primarily states that the agency "shall consent" or its consent "shall be filed" with a court before the judicial approval of an adoption petition may proceed.¹⁷ For the most part, courts have accepted the statutory language as controlling, often with unpopular results.¹⁸ In certain instances, however, courts have refused to follow legislative directives and have effectively amended the statutes in question to permit judicial approval of adoption decrees in the absence of agency consent.¹⁹

14. 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (4th ed. 1972) [hereinafter cited as SUTHERLAND].

15. *E.g.*, *In re Adoption of Matthew*, 4 Ore. App. 308, 477 P.2d 235 (1970).

16. *E.g.*, *Mitchell v. Davis*, 24 Conn. Super. 76, 80, 186 A.2d 811, 814 (1962); *In re Adoption by Alexander*, 206 So. 2d 452 (Fla. Ct. App. 1968).

17. ALASKA STAT. § 20.10.020(5) (Cum. Supp. 1973); COLO. REV. STAT. ANN. § 4-1-6(1), (2)(h) (1963); GA. CODE ANN. § 74-403(4) (1973); IDAHO CODE § 16-1504 (Cum. Supp. 1974); ILL. ANN. STAT. ch. 4, § 9.1-8 (Smith-Hurd 1974); IND. STAT. ANN. § 3-120(a)(3) (Burns Cum. Supp. 1972); IOWA CODE ANN. § 600.3 (Cum. Supp. 1974); KAN. STAT. ANN. § 59-2102(5) (Cum. Supp. 1972); MICH. COMP. LAWS ANN. §§ 710.3(b), (c), (e) (Cum. Supp. 1974); MONT. REV. CODES ANN. § 61-205(4) (1970); NEB. REV. STAT. § 43.105(1), (2) (1974); N.H. REV. STAT. ANN. § 170-B:5(I)(f) (Supp. 1973); N.J. STAT. ANN. tit. 9:3-23 (1960); N.Y. DOM. REL. LAW § 111 (McKinney Cum. Supp. 1974); N.C. GEN. STAT. § 48-9(a)(1), (3); 48-9.1 (Cum. Supp. 1974); OHIO REV. CODE ANN. § 3107.06 (Page 1972); OKLA. STAT. ANN. tit. 10, § 60.5(4) (Cum. Supp. 1974); R.I. GEN. LAWS ANN. §§ 15-7-6 to -7-7 (Supp. 1973); S.C. CODE ANN. § 10-2587.7(d) (Cum. Supp. 1973); TENN. CODE ANN. § 36-113 (1955); UTAH CODE ANN. § 78-30-4 (Supp. 1973); VT. STAT. ANN. tit. 15, §§ 435(5), (6), (7) (Cum. Supp. 1974); WYO. STAT. ANN. § 1-710.1(a) (Cum. Supp. 1973).

18. *In re St. John*, 51 Misc. 2d 96, 272 N.Y.S.2d 817 (Family Ct. 1966); *In re Adoption of Wyatt*, 40 Ohio Misc. 47, 210 N.E.2d 925 (P. Ct. 1965).

19. In the case of *In re Haun*, 31 Ohio App. 2d 63, 286 N.E.2d 478 (1972), petitioners originally obtained custody of the child through a foster-parent program since they were over the age limits set by the agency for adoptive parents. Age, then, was the reason for the disapproval of the petition by the agency. The child, when originally given to the petitioners, was suffering

A. Statutory Construction

The obvious starting point in the analysis of the meaning of any statute is the language of the statute itself. It is within this context that courts have often used the traditional rules of statutory interpretation to find agency consent mandatory in adoption proceedings. The plain meaning rule,²⁰ for example, is particularly effective to assert the necessity of agency consent when a statute sets forth such consent as an express prerequisite to the approval of an adoption pe-

from a serious neurological disorder, but under their care progressed to the point where she was considered a normal healthy child. The court found that the child's progress would be jeopardized were the decision of the agency to be given effect. Faced with these circumstances the court looked past the words of the Ohio statute and granted the adoption petition. This result was later followed under less compelling circumstances by Ohio's highest court in *State ex rel. Portage County Welfare Dep't v. Summers*, 38 Ohio St. 144, 311 N.E.2d 6 (1974). The case of *In re Mark T.*, 8 Mich. App. 122, 154 N.W.2d 27 (1967), also appears to overrule the mandatory wording of the applicable statute. The situation was so drastic, however as to suggest that the holding would not go beyond the fact pattern. In that case, the child in question was illegitimate; its natural parents had lived together for an extended period during which the child and its father formed a rather deep relationship. The mother took the child with her when domestic difficulties arose. The father expended a considerable amount of money and energy to find the child and succeeded only after the child had already been turned over to an agency by the mother and placed with adoptive parents. The father then sued for and obtained custody of the child. The Michigan Court of Appeals affirmed the lower court's decision.

It is important to resolve the issues involved in judicial review of agency decisions because a number of states still await a judicial ruling on the issue. The currently confused state of the law on both "may consent" and "shall consent" types of statutes generates an unfortunate uncertainty as to the result when the statutes are construed on this point. Those statutes of the "may consent" type that have not been construed include the following: ALA. CODE tit. 27, § 3 (Cum. Supp. 1974); CONN. GEN. STAT. ANN. P.A. 73-156, § 10 (App. 1974); MISS. CODE ANN. § 93-17-5 (1973); NEV. REV. STAT. tit. 11, § 127.050 (1973); W. VA. CODE ANN. § 49-3-1 (Cum. Supp. 1974). Those statutes of the "shall consent" type include: ALASKA STAT. § 20.10.020(5) (Cum. Supp. 1973); COLO. REV. STAT. ANN. §§ 4-1-6(1), (2)(b) (1963); GA. CODE ANN. § 74-403(4) (1973); IDAHO CODE § 16-1504 (Cum. Supp. 1973); IND. STAT. ANN. § 3-120(a)(3) (Burns Cum. Supp. 1972); KAN. STAT. ANN. § 59-2102(5) (Cum. Supp. 1972); MONT. REV. CODES ANN. § 61-205(4) (1970); NEB. REV. STAT. §§ 43.105(1), (2) (1974); N.H. REV. STAT. ANN. § 170-B:5(I)(f) Supp. 1973); N.J. STAT. ANN. tit. 9:3-23 (1960); N.C. GEN. STAT. § 48-9(a)(1), (3); 48-9.1 (Cum. Supp. 1974); R.I. GEN. LAWS ANN. § 15-7-6 to -7 (Supp. 1973); S.C. CODE ANN. § 10-2587.7(d) (Cum. Supp. 1973); TENN. CODE ANN. § 36-113 (1965); UTAH CODE ANN. § 78-30-4 (Supp. 1973); VT. STAT. ANN. tit. 15, §§ 435(5), (6), (7) (Cum. Supp. 1974); WYO. STAT. ANN. § 1-710.1(a) (Cum. Supp. 1973).

20. See, e.g., *Caminetti v. United States*, 242 U.S. 470 (1917); 2A SUTHERLAND § 46.01.

tition. For a court that adopts this approach, the judicial role, even when confronted with a difficult fact situation, is limited to denying judicial review and in some cases commiserating with the parties and advocating legislative change. For example, in the case of *In re St. John*,²¹ a New York county welfare department denied an adoption petition because the petitioners, who had originally been granted custody of the child on a foster parent basis, were over the age limits set by the agency. Another justification offered by the agency was that the child was fair-skinned and fair-haired and the petitioners were dark-skinned. The evidence disclosed that the child had lived with the petitioners for all but a few days of her life and had been given the best of care. Upon petition, the Family Court of Ulster County refused to weigh these facts and the additional possibility of psychological trauma for the child if separated from petitioners. The court focused solely on the words of the statute, decided that the only relevant fact was the agency disapproval, and denied review.²²

In *St. John*, the policy of judicial restraint ultimately produced a change in the law: In response to the decision and the public furor it aroused, the New York legislature rewrote a part of the adoption statute. The new provisions give foster parents first preference if the child has been living with them more than two years and vest in the court the power to review agency disapproval of an adoption submitted by foster parents.²³ However, even in cases such as this or when outright judicial lobbying is successful, the change is time-consuming. In the interim, technical readings of statutory language continue to produce inequitable results. In *re Sherman*,²⁴ a decision of the Minnesota Supreme Court, illustrates this fact. In *Sherman*, the court stepped in as *parens patriae* to protect an abused child from his parents. After terminating all parental rights, the court committed the child to an agency for adoption. However, once the agency assumed custody from the natural parents, the court washed its hands of the entire matter and held that it retained no power over the child's future—even in the event that the adoption agency were to act unreasonably in re-

21. 51 Misc. 2d 96, 100, 272 N.Y.S.2d 817, 824 (Family Ct.), *rev'd on other grounds*, 26 App. Div. 2d 980, 274 N.Y.S.2d 798 (1966).

22. 51 Misc. 2d 96, 112-14, 272 N.Y.S.2d 817, 834-36 (Family Ct. 1966).

23. N.Y. SOC. WELFARE LAW § 374(1-a) (McKinney Cum. Supp. 1973). The statute which covers non-foster parent petitions is N.Y. DOM. REL. LAW § 111 (McKinney Cum. Supp. 1974).

24. 241 Minn. 447, 63 N.W.2d 573 (1954).

jecting an adoption petition. Since it was the concern for the child's welfare in providing a stable, safe family environment that led the court to assume jurisdiction in the first instance, it seems inconsistent for the court to withdraw abruptly upon the entrance of the agency into the picture when it is still possible that the desired result might not have been obtained.

Some courts, however, have refused to reach the conclusions called for by a literal reading of jurisdictional statutes and have defied the clear terms of statutes.²⁵ Reasoning that no statutory language should be so construed as to lead to unreasonable results,²⁶ these courts have concluded that no rule of statutory construction can be justified apart from the consequences of its application. When the circumstances for approving an adoption have been compelling, some courts have held that they cannot be ignored for the sake of absolute adherence to a rule of construction.

Another rule of statutory interpretation that appears to call for a strict requirement of agency consent is that statutes in derogation of common law are to be strictly construed.²⁷ As one court has put it, "[b]eing of purely statutory origin, a legal adoption results if the procedure is followed, but fails if any essential requirements of the statute are not complied with"²⁸ Several state courts have adopted this approach and have required agency consent for judicial jurisdiction when the statute was of the ambiguous "may consent" type,²⁹ a view which extends the strict construction rule much further than its intended scope. The basic flaw in this argument is that adoption has no history in the common law.³⁰ Thus, broadly

25. The Ohio experience is illustrative of the effects of judicial impatience with unrealistic statutes. See note 14 *supra* and accompanying text.

26. *E.g.*, *In re Adoption by Alexander*, 206 So. 2d 452 (Fla. Ct. App. 1968); *In re Mark T.*, 8 Mich. App. 122, 154 N.E.2d 27 (1964); *In re Haun*, 31 Ohio App. 2d 63, 286 N.E.2d 478 (1972). See generally *Commissioner v. Brown*, 380 U.S. 563 (1965); 2A SUTHERLAND § 45.12.

27. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779 (1952). But see 2A SUTHERLAND § 61.04.

28. *Blue v. Boisvert*, 143 Me. 173, 178, 57 A.2d 498, 501 (1948).

29. ME. REV. STAT. ANN. tit. 19, § 532 (Cum. Supp. 1974), construed in *Blue v. Boisvert*, 143 Me. 173, 181, 57 A.2d 498, 502 (1948); MINN. STAT. ANN. § 259.24(1)(f) (1971), construed in *In re Sherman*, 241 Minn. 447, 63 N.W.2d 573 (1974); ORE. REV. STAT. § 109.316(1), (2) (1973), construed in *In re Adoption of Matthew*, 4 Ore. App. 308, 477 P.2d 235 (1970).

30. Adoption was unknown at English common law although it existed in Roman law. *Adoption of McKinzie*, 275 S.W.2d 365, 369 (Mo. Ct. App. 1955). The court in *McKinzie* went so far as to state that adoption is repugnant to the common law.

construing agency consent requirements for adoption cannot be in derogation of any common law precepts. Indeed, the only common law rule that relates to the adoption of children is that the natural parents' rights to their child are sacrosanct.³¹ Adoption statutes recognize this fact but with several qualifications. By allowing the transfer of children to adoptive parents these statutes are in derogation of common law only because they compromise the rights of the natural parents. Thus, if anything, adoption statutes should be strictly construed in favor of the parent,³² not in favor of the adoption agency, which is a creature of statutory law with no common law origins. This rubric, therefore, offers little assistance to the view that agency consent is a prerequisite for judicial jurisdiction of agency decisions.

B. *Agency Consent as a Jurisdictional Prerequisite*

Some courts holding that the consent of an adoption agency is essential to consideration of an adoption petition have looked to the rationale that if the child's custodian does not consent, there is no jurisdiction to act on the petition.³³ The jurisdictional approach, however, is not based on any single concept and embraces a number of arguments. The Iowa Supreme Court in *In re Adoption of Cheney*³⁴ founded its jurisdiction-based decision to deny an adoption petition on the nature and history of adoption prior to the advent of the agencies: "We believe our present adoption statutes still contemplate and are based on the principle of consent by some one having legal custody."³⁵ Before the wide acceptance of adoption and the creation of agencies, the parents and relatives were the

Prior to the statutory change in Texas in favor of judicial review, the Texas courts relied upon the strict construction argument to buttress their jurisdictional arguments. *Lutheran Social Serv., Inc. v. Farris*, 483 S.W.2d 693 (Tex. Civ. App. 1972).

31. "The transfer of the natural rights of the parents to their children was against its policy and repugnant to its principles." *Driggers v. Jolley*, 219 S.C. 31, 36, 64 S.E.2d 19, 21 (1951).

32. *Id.*; *In re Adoption of Rule*, 435 S.W.2d 35 (Mo. Ct. App. 1968).

33. "Consent of the required parties . . . is jurisdictional." *In re Stern*, 2 Ill. App. 2d 311, 314, 120 N.E.2d 62, 64 (1954); see *Ellis v. Woods*, 214 Ga. 105, 103 S.E.2d 297 (1958); *In re Adoption of Thornton*, 184 Kan. 551, 337 P.2d 1027 (1959); *In re Adoption of Simpson*, 203 Ore. 472, 280 P.2d 368 (1955).

34. 244 Iowa 1180, 59 N.W.2d 685 (1953).

35. *Id.* at 1186, 59 N.W.2d at 688.

parties directly involved who gave the requisite consent. The Iowa court assumed that the same considerations that made parental consent mandatory made agency consent equally necessary.³⁶

The reasoning in *Cheney* represents one variant of the most popular jurisdictional argument: the doctrine of *in loco parentis*.³⁷ *In loco parentis* is essentially a jurisdictional argument in that it analogizes agency consent to the parental consent that is generally required to give the court jurisdiction when the parents have custody. In other words, the agency stands "in the place of the parent" of the child and, because parental consent is essential in the case of natural parents releasing a child for adoption, so too, is agency consent essential where the agency holds custody prior to the adoption. By obtaining the consent of the natural parents to assume custody of the child, as required by law, the agency assumes the position of the parents and becomes the only party qualified to give consent to further transfer of custody.³⁸

One need not look to veiled judicial references to identify the *in loco parentis* rationale. The adoption statute of Oregon specifically mentions the need for consent in terms of the doctrine.³⁹ Moreover, the doctrine of *in loco parentis* pervades even those states whose adoption statutes make no reference to the issue of judicial review. The Texas Supreme Court in reviewing its statute which made no reference to judicial review⁴⁰ (until a 1974 amendment) stated: "[A]fter parental consent for placement is given the child-placing agency stands *in loco parentis* to the child and is clothed with authority to give or withhold the consent necessary to entry of a judgment for adoption."⁴¹

36. *Id.* at 1180, 59 N.W.2d at 685.

37. *In re David*, 256 A.2d 583 (Me. 1969); *Lutheran Social Serv., Inc. v. Farris*, 483 S.W.2d 693 (Tex. Civ. App. 1972); *In re Adoption of Matthew*, 4 Ore. App. 308, 477 P.2d 235 (1970).

38. As one court has stated the premise, the states have "substitute[d] the consent of the agency to the adoption for the consent of the parent." *In re David*, 256 A.2d 583, 586 (Me. 1969).

39. ORE. REV. STAT. tit. 11, § 109.316(1) (1973), provides in pertinent part, "The Children's Service Division or an approved child-caring agency of this state, acting *in loco parentis*, may consent to the adoption of a child"

40. TEX. FAM. CODE ANN. tit. 2, § 16.05 (1973).

41. *Catholic Charities v. Harper*, 161 Tex. 21, 24-25, 337 S.W.2d 111, 113 (1960). Other cases under the old statute reached a similar result: *Wilde v. Buchanan*, 303 S.W.2d 518 (Tex. Civ. App.), *reh. denied*, 157 Tex. 606, 305 S.W.2d 778 (1957); *Pearce v. Harris*, 134 S.W.2d 859 (Tex. Civ. App. 1940).

Although the simplicity of a rationale that simply replaces parental consent with agency consent is attractive,⁴² the justification for requiring consent in the former situation is not applicable to the latter. The reasons for requiring parental consent to adoption focus on the importance our society places on the parent-child relationship and are jealously guarded by the courts, which have consistently affirmed the uniqueness of the family bond. In *State ex rel. Ashcroft v. Jensen*,⁴³ the Minnesota Supreme Court stated, "Ordinarily parents are entitled to the custody of their child. Every court recognizes the deep and enduring affection which parents have for their children and their willingness to make sacrifices and endure hardships in their interests which a stranger would not consider."⁴⁴

Because the surrendering of one's child for adoption severs this relationship completely and permanently, the circumstances under which parental consent is given must be closely scrutinized. Since the parent frequently relinquishes the child for adoption during a period of severe stress, such as after the birth of an illegitimate child or in the midst of a serious financial crisis, the requirement of formal consent ensures the parents time for reflection on the seriousness and finality of the action. It also provides a buffer against those who would take advantage of the parents' vulnerability. The "desperate straits" rationale is not the only justification for requiring parental consent. Even if the parent is not under any particular stress, the giving up of one's child is a most serious undertaking and that fact should be formally impressed upon the parent.

There is another reason for ensuring that the parent is freely and knowingly surrendering his child: formal consent protects the adopting parents from later claims by natural parents who undergo a change of heart. All of these considerations are apparent to the

42. The popularity of the *in loco parentis* approach is demonstrated by its many theoretical spinoffs. One commentator has theorized, for example, that agency consent is a necessary prerequisite of an adoption petition because the agency is presumed to act in the best interests of the child. The agency, therefore, makes the decision the child would make, were he competent to make the decision—a sort of "*in loco pueri*" approach. Merrill, *Toward Uniformity in Adoption*, 40 IOWA L. REV. 299, 304 (1955); see *In re Adoption of Matthew*, 4 Ore. App. 308, 312, 477 P.2d 235, 237 (1970).

43. 214 Minn. 193, 7 N.W.2d 393 (1943).

44. *Id.* at 195, 7 N.W.2d at 394-95. This same court has even implied that the "natural affection between the parents and the offspring" is a right "possessing constitutional dignity . . . as much as . . . the protection of the rights of the individual to life, liberty, and the pursuit of happiness" *State ex rel. Nelson v. Whaley*, 246 Minn. 535, 547-48, 75 N.W.2d 786, 794 (1956).

judiciary; as a result there is an institutionalized hesitancy to rule against the parents, based on the judicial presumption that children are better left with their natural parents.⁴⁵ The foregoing considerations do not apply to agency consent to an adoption petition. For the entire period during which an agency has custody of the child, its primary goal is to effect an adoption. The parental bond does not linger; it has already been severed either by court order or by the consent form that the parents executed upon releasing the child to the agency. Agencies accept children temporarily until, hopefully, an adoption can be arranged; the surrender of custody is the desired result of the agency-child relationship. None of the protective considerations relevant when the natural parents have custody are present. This fact has been expressly recognized by the California Supreme Court in *Adoption of McDonald*.

The consent of these public agencies, or of a licensed private agency, cannot be equated with parental consent. The right of the natural parent to refuse consent is based on the natural affection between parent and child. . . . Manifestly the same "natural and sacred rights" are not present when a child has been relinquished to an agency for adoption. At most the agency acquires . . . the legal custody of the child.⁴⁶

In loco parentis, therefore, fails because no adoption agency can realistically form the same interest in a child as a natural parent. However, the reasons for attacking it extend beyond the basis of the theory into its legal effects. First, in loco parentis by its terms purports to state that the adoption agency is standing in the place of the parent. In practical effect, however, the doctrine elevates the adoption agency to a position above that of the parent.⁴⁷ Although parents are presumed to be the ones best equipped to deal with their children,⁴⁸ the presumption is rebuttable; parental rights can be subordinated when a court believes that the circumstances merit an intrusion into the family situation. However, the absolute requirement of agency consent before judicial review makes the agency's decision final. This situation is most clearly illustrated in states where the pertinent legislative standard for acting on adoption petitions is the best interest of the child.⁴⁹ In such states, if

45. *In re Mark T.*, 8 Mich. App. 122, 149-50, 154 N.W.2d 27, 41 (1967).

46. 43 Cal. 2d 447, 459, 274 P.2d 860, 867 (1954).

47. *In re Adoption by Alexander*, 206 So. 2d 452 (Fla. Ct. App. 1968).

48. *In re Mark T.*, 8 Mich. App. 122, 149, 154 N.W.2d 27, 41 (1967).

49. *E.g.*, ORE. REV. STAT. § 109.316(1) (1973).

parental rights may be subordinated for specified misconduct that threatens the child's interests, it is untenable that the agency rejection be unreviewable even if that decision jeopardizes the child's best interests.

Another objection to *in loco parentis* lies in its underlying assumption that an adoption agency is best suited to represent the interests of the child.⁵⁰ This notion failed to take into account the conflict of interests that may be created in the adoption process. To say that an agency is free to dedicate itself totally to the interests of another party is to ignore the fact that the agency itself has substantial interest in the outcome of an adoption proceeding. When people ask a court to accept an adoption petition without the consent of the agency, they are attacking the agency's judgment and, in many cases, the agency regulations upon which the decision was based. Thus, when a petition has been disapproved, it is unrealistic to suppose that the interests of the agency and the child are identical. The agency's interest in protecting its own status may prevent it from advocating what is in fact best for the welfare of the child.

Formulating the jurisdictional argument in terms of *in loco parentis* conceals the fact that denying judicial review upon agency disapproval results in the complete absence of judicial scrutiny. If the custodian's denial of consent blocks judicial review, then only when the agency approves will the court look into the facts of the petition. By and large, however, these petitions meet with no opposition and there is no motivation for the courts to question the processes leading to approval. If there is any challenge to the proceeding it would be by the natural parents or the child, and the focal point of this opposition would probably be the original surrender of the child, not subsequent agency actions.

Thus, the *in loco parentis* justification for requiring agency consent is inconsistent with the reality of the agency-child relationship, affords the agency even greater insulation from court action than natural parents are afforded, veils the prime interests of the adoption agency, and, once stripped to its essentials, robs the court of any meaningful opportunity to explore the agency's decision.

C. *The Position of the Advocates of Judicial Review*

The rationales used by the courts to justify the finding that the

50. See notes 20-25 *supra* and accompanying text.

judiciary does not have the power to review agency decisions have serious flaws. Arguments based on the textbook rules of statutory construction that lead to a finding of mandatory agency consent can be countered with rules of interpretation that are equally sound. Moreover, arguments that agency consent is a prerequisite of judicial review are circular. Finally, the *in loco parentis* rationale cannot be reconciled with the independent interests of adoption agencies. It is upon these flaws then, that the advocates of judicial review build their case.

The view that agency consent is a jurisdictional prerequisite has always been subject to judicial criticism.⁵¹ However, many of the courts that have decided in favor of judicial review have occupied themselves with the substantive problems of the children and adoptive parents before them, apparently dismissing the jurisdictional arguments summarily.⁵² The jurisdictional theory survives in many states only because it has not been expressly discredited. There are, though, strong arguments against allowing an agency to monopolize the adoption process under statutes that appear to call for agency consent.

One of the strongest possible reasons for not regarding agency consent as a jurisdictional prerequisite is that statutes that deal specifically with the question are not jurisdictional in nature but intended merely to set forth the formalities of the process. The Arkansas Supreme Court in dealing with a statute of the "may consent"⁵³ variety aptly presents the argument: "In short, the consent of the guardian is not jurisdictional, but is only one of the ways to dispense with the parent's consent. . . . The jurisdiction of the Probate Court to act in adoption cases is not dependent on the willingness of the Welfare Director, as guardian of the minors, to consent to the proceedings."⁵⁴ The crux of this argument is that the bounds of judicial jurisdictions are set out in the general jurisdiction sections of adoption statutes—those that establish the competency of particular courts to adjudicate matters pertaining to adoption. Other specific statutory provisions, therefore, should not be

51. See *In re Meyer's Estate*, 197 Ore. 520, 254 P.2d 227 (1953).

52. See *Ratcliffe v. Williams*, 220 Ark. 807, 250 S.W.2d 330 (1952); *In re Adoption by Alexander*, 206 So. 2d 452 (Fla. Ct. App. 1968); *In re Mark T.*, 8 Mich. App. 122, 143, 154 N.W.2d 27, 37 (1967); *In re Sherman*, 241 Minn. 447, 63 N.W.2d 573 (1954); *In re Haun*, 31 Ohio App. 2d 63, 286 N.E.2d 478 (1972).

53. See note 9 *supra*.

54. *Ratcliffe v. Williams*, 220 Ark. 807, 250 S.W.2d 330, 331 (1952).

permitted to restrict the scope of subject matter jurisdiction. This approach is followed in the Ohio case of *State ex rel. Portage County Welfare Department v. Summers*.⁵⁵

We conclude that such deprivation of authority [denying judicial review] would not only be anomalous but would constitute an impermissible invasion of the Probate Court's power to act in areas in which the court is specifically vested by statute with authority to perform its judicial power granted by the Constitution. Therefore, R.C. 3107.06(D) may not operate to divest the Probate Court of its necessary judicial power to fully hear and determine an adoption proceeding. To hold otherwise would leave the fate of the adoptive child to agency whim or caprice without having the agency's reasons for denying consent adjudicated.⁵⁶

This view significantly reduces the impact of adoption agency decisions yet it does not appear to thwart the purpose of the agency system as originally contemplated. Since the role of adoption agencies is primarily to place children in suitable environments, the agencies should be recognized in the eyes of the law more as conduits than independent centers of power. Making their consent the controlling factor in the adoption process is inconsistent with this status since it effectively usurps the power of the state delegated to the courts in the general jurisdictional statutes.⁵⁷

Another, less formalistic, argument for the interposition of judicial review of adoption agency determinations used by some courts dictates that questions arising in the context of adoption be disposed of in an equitable manner. The embodiment of the inherently equitable nature of adoption is the standard of "best interests of the child," which most courts use in dealing with adoption and related issues.

The initial step in reaching an application of the best-interests test to the merits, for those courts acting under a statute that does not expressly mandate review, is frequently to invoke the power of the court to adjudicate, on behalf of the state, rights and interests in which the state has an interest. The power of the state to provide for those unable to care for themselves derives from the doctrine of *parens patriae*.⁵⁸ Because of the clear relevance of the doctrine to the condition of children and the flexibility of courts of

55. 38 Ohio St. 2d 144, 311 N.E.2d 6 (1974).

56. *Id.* at 152, 311 N.E.2d at 11.

57. *Ratcliffe v. Williams*, 220 Ark. 807, 809, 250 S.W.2d 330, 331 (1952).

58. CLARK 572.

equity in handling matters akin to custody, *parens patriae* became a justification for chancery to exert its power to care for distressed children. Because of the continuing oversight of courts of equity over complaints brought to their attention the courts seem particularly well equipped to handle the problem of ongoing custody contests. Equity will not tolerate attempts to secure its ouster from jurisdiction.⁵⁹ Once a dispute is brought before the court, it will be entertained until the problem is brought to the desired resolution: "[C]hancery's power concerning the welfare of legitimate and illegitimate children does not disappear upon the release of the child for adoption."⁶⁰ Although *parens patriae* developed when adoption was unknown as a method of child care, there is no apparent reason why it should not be expanded to cover it.

The attractiveness of a *parens patriae* approach is that it invokes all the flexibility inherent in equitable procedures. Technical requirements of jurisdiction are subordinated to the rights of interested parties because equity will not permit the form of the transaction to prevail over its substance.⁶¹ Having invoked notions of the power of the state and *parens patriae* to justify accepting jurisdiction, the courts analyze the merits of the case on the basis of the best interests of the child.⁶² Authority for the best-interests standard is usually found in a reading of statutory purpose: "The main purpose of adoption statutes is the promotion of the welfare of children, bereft of the benefits of the home and care of their real parents, by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child."⁶³

The equitable nature of the *parens patriae* and best-interests approach is an effective tool for courts dealing with statutes that do

59. *Cf. Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 74 N.J. Eq. 457, 71 A. 153 (1908).

60. *In re Mark T.*, 8 Mich. App. 122, 143, 154 N.W.2d 27, 37 (1967).

61. *Southern Ry. Co. v. United States*, 306 F.2d 119 (5th Cir. 1962); *Englestein v. Mackie*, 35 Ill. App. 2d 276, 182 N.E.2d 351 (1962). One commentator discussing *In re Adoption by Alexander*, states that the "Department argued the case principally on the technical legal issues of contract and procedural law." The petitioners convinced the court by arguing the underlying humanitarian issues. *Katz, Legal Aspects of Foster Care*, 5 FAMILY L.Q. 283, 298 (1971).

62. *E.g., In re Mark T.*, 8 Mich. App. 122, 154 N.E.2d 27 (1964); *In re Haun*, 31 Ohio App. 2d 63, 286 N.E.2d 478 (1972).

63. *Adoption of Barnett*, 54 Cal. 2d 370, 377, 354 P.2d 18, 22, 6 Cal. Rptr. 562, 566 (1969).

not expressly empower the courts to review because it allows them to look at the whole adoption process, which is essentially humanitarian. The gravamen of this approach is simply that the letter of the law should not be interpreted so as to violate its spirit.⁶⁴ Adoption statutes were, after all, passed primarily to encourage the adoption of homeless children by deserving individuals.⁶⁵ The trust of the agencies in this regard is a critical one; they must ensure that the petitioners are, in fact, deserving. However, there must be checks on their power to protect against arbitrary denials. Without constraints, "agency consent becomes superior to all other considerations."⁶⁶ Such a development thwarts the statutory purpose by assigning to the agency process a significance apart from the results it produces.⁶⁷ Deference to agency expertise is essential, but concession of state power is extremely undesirable.

As courts cannot be content to follow the legal conclusions of agencies, neither can they blindly accept the intermediate factual conclusions. This is not to imply that the agency will intentionally err in its findings of fact or that the court itself is infallible, but rather to indicate that the rights and interests involved are of such importance that all the parties should have the opportunity to be heard in a neutral forum. A *de novo* hearing insures that the adoption process will retain its equitable nature, a necessity for any inquiry into the best interests of the individual. Speaking to the flexibility required in an adoption proceeding, one court has stated: "Such proceedings are equitable in nature. In fact, because of the bearing they have on the entire course of the life of the child, they are sometimes said to be equitable in the highest degree"⁶⁸

The best way to resolve the question of the significance of agency determinations in the context of the flexible equitable procedure is to give agencies a role commensurate with their subordinate status. Thus the agency grant or denial of consent should possess evidentiary rather than conclusive force. This change would make agency action but one of many elements to be balanced in

64. *In re Haun*, 31 Ohio App. 2d 63, 64, 286 N.E.2d 478, 479 (1972).

65. *Frederick v. District Court*, 119 Mont. 143, 155, 173 P.2d 626, 632 (1946) (dissenting opinion).

66. *In re Haun*, 31 Ohio App. 2d 63, 67, 286 N.E.2d 478, 481 (1972).

67. Some courts have maintained that the stature of the adoption process should be foremost in the construction of a statute. *In re Adoption of Moriarty*, 260 Iowa 1279, 1286, 152 N.W.2d 218, 221 (1967); *Lutheran Social Serv. Inc. v. Farris*, 483 S.W.2d 693, 695 (Tex. Civ. App. 1972).

68. *Wilson v. Pierce*, 14 Utah 2d 317, 318, 383 P.2d 925, 926 (1963).

the ultimate determination of the child's best interests.⁶⁹ In deference to the agency, agency determinations could be given presumptive force—so long as the presumption remained rebuttable. This approach is proper for a number of reasons. Since the parents are attacking an administrative decision, it is reasonable that they should be compelled to prove the nature of the agency's error.⁷⁰ Also, it is inappropriate to place the agency on the defensive when it is, in fact, considered expert in the matter and often paid by the state for its expertise. Since it is a valuable resource, its opinions should be given considerable weight.⁷¹

The best-interests approach, then, is the antagonist of a no-review policy; best-interests all but dictates that adoption agency determinations be reviewable and that the agency's judgment of the best interests become merely a factor in the ultimate decision of the court. Because it ensures a balanced resolution of the issue of what steps best promote the child's welfare, the tendency of the courts and legislatures to favor the best-interests approach is increasing.

In most cases, the progress of the best-interests approach has been incremental. In one state only persistent legislative efforts have elevated the best-interests approach over the need for agency consent. In Wisconsin the original adoption statute was silent on the issue of the need for judicial review.⁷²

The Wisconsin Supreme Court in *In re Adoption of Tschudy*⁷³ had taken the position that agency consent was absolutely essen-

69. *In re Haun*, 31 Ohio App. 63, 286 N.E.2d 478 (1972).

70. In Washington, for example, a statute that expressly mandates a best-interests approach, WASH. REV. CODE ANN. § 26.32.040(3) (1955), has been interpreted as placing the burden of proof on the adoptive parents to demonstrate the invalidity of the agency determination. *In re Adoption of Reinius*, 55 Wash. 2d 117, 123-28, 346 P.2d 672, 675-78 (1959).

71. The court in *Department of Welfare v. Jarboe*, 464 S.W.2d 287, 291-92 (Ky. 1971), states that the parties petitioning without the agency's consent were claiming that

their facts, conclusions and philosophies are correct as opposed to all the professionals who are in the pay of the state to carry out the state policy. . . .

. . . .

All of the above talent is being paid for by the taxpayers of Kentucky at a cost of many thousands of dollars per month. Its sole purpose is to aid and direct the lives of children This court or no court should thwart or interfere with the activities of these people without strong cause.

72. Act of June 9, 1947, ch. 218, § 5, [1947] Wis. Laws 301, as amended, Act of June 16, 1953, ch. 288, § 3, [1953] Wis. Laws 268 (repealed 1955).

73. 267 Wis. 272, 65 N.W.2d 17 (1954).

tial to an adoption petition. A year later, the Wisconsin legislature amended the statute to permit waiver of consent if the agency's decision was "arbitrary, capricious or not based on substantial evidence."⁷⁴ However, the court's decision in *In re Adoption of Shields*⁷⁵ robbed the new statute of any meaningful effect by holding that a consideration of the best interests of the child was not enough; there had to be a finding that the custodian did not have a bona fide belief that its denial of consent was justifiable.⁷⁶ The Wisconsin legislature swiftly responded in an unmistakable fashion, amending the statute so that courts would have no alternative but to undertake review.⁷⁷ In 1969 the legislature again amended the statute to reduce petitioner's burden of proof further changing the standard required to overcome the agency's decision from a clear preponderance to a fair preponderance.⁷⁸ The Wisconsin court did not ignore the legislature again. The case of *In re Adoption of Tachick*⁷⁹ affirmed that the court would review the factual background behind the adoption decision and make its own decision concerning the child's best interests upon agency rejection of a petition.

In other states, where legislative cues have not been so forceful, the judiciary has been compelled to set the pace for the use of the best interests approach. Here, the movement to date has been slow, but promising. Illustrative of the process in the Minnesota judicial experience was *In re Sherman*,⁸⁰ where the court initially took the hardline approach that consent was a prerequisite. A more recent case, *Fleming v. Hurst*,⁸¹ however, indicates a changing posture of the Minnesota court. *Fleming* chose to undertake a review of agency disapproval, distinguishing *Sherman* on the basis of the nature of the agency exercising the oversight function. In *Sherman* a private agency was involved; in *Fleming* the consent of the Commissioner of Child Welfare was at issue. This distinction may have been a strained one, but it did indicate that the Minnesota court was no longer comfortable with agencies possessing complete con-

74. The 1955 revision of the law created § 48.85 to deal with the issue of guardian disapproval. Act of Aug. 4, 1955, ch. 575, § 7, [1955] Wis. Laws 748 (repealed 1959).

75. 4 Wis. 2d 219, 89 N.W.2d 827 (1958).

76. *Id.* at 224, 89 N.W.2d at 830.

77. Act of Aug. 14, 1959, ch. 306, § 18, [1959] Wis. Laws 363.

78. WIS. STAT. ANN. § 48.85 (Cum. Supp. 1974).

79. 60 Wis. 2d 540, 210 N.W.2d 865 (1973).

80. 241 Minn. 447, 63 N.W.2d 573 (1954).

81. 271 Minn. 337, 136 N.W.2d 109 (1965).

trol of the adoption process.

The movement has not all been in one direction, however. Although the best-interests-of-the-child approach seems to be both practical and popular, it is by no means universally accepted. The Uniform Adoption Act, for instance, on its face requires consent.⁸² Certain state statutes⁸³ continue to require agency consent. The justifications offered by those who hold out against the trend of judicial review are diverse. Some writers maintain that in order to preserve stability in the adoption process agency decisions should not be overturned,⁸⁴ a number of courts continue to use the reasoning of *in loco parentis* and strict construction.⁸⁵

III. THE CAPACITY OF COURTS TO DEAL WITH ISSUES RAISED BY JUDICIAL REVIEW

A. *Agencies as Experts: The Other Side of the Coin*

There is a more pervasive question that arises in the issue of judicial review of agency determinations: Do courts possess the ability to deal with problems raised by the adoption process, specifically the best interests standard? Some courts have explicitly stated their reluctance to deal with adoption despite statutory directives providing for judicial scrutiny of agency decisions based upon a concern that they could not adequately evaluate the broad range of factors to be considered.⁸⁶ In other decisions, these judicial fears might have been a tacit justification for abstention.

The main premise of those who view the courts as inherently incapable of confronting adoption problems is the same argument that arises in any debate over the relative merits of an administrative vis-à-vis judicial forum: the expertise and familiarity of the agency with the problems in the area.⁸⁷ It is undeniable that

82. UNIFORM ADOPTION ACT § 5.

83. *E.g.*, IND. STAT. ANN. § 3-120(a)(3) (Burns Cum. Supp. 1972).

84. *See, e.g.*, Note, 49 TEXAS L. REV. 1128 (1971), which admits that giving agencies the power to give or withhold consent without judicial review would authorize the agencies to withhold consent arbitrarily, but ultimately opts for giving that power to the agency in the interest of stabilizing the adoption process.

85. *See, e.g.*, *In re Adoption of Matthew*, 4 Ore. App. 308, 477 P.2d 235 (1970).

86. *See, e.g.*, *Department of Welfare v. Jarboe*, 464 S.W.2d 287, 291-92 (Ky. 1971).

87. "The process of arranging adoptions involves knowledge of child development, genetics, anthropology, pediatrics, sociology, as well as social work

adoption agencies, as specialists, are better equipped to handle problems that normally arise in adoption situations. Agencies possess the staff and facilities to deal with the complex, emotion-fraught process. Adoption agencies are able to deal with the problems and needs of all the parties, the natural and adoptive parents as well as the child.⁸⁸ Toward this end, the agencies amass complete case studies of the prospective parents in order to assure stability in the child's new environment. The courts, on the other hand, offer overcrowded dockets and judges who often have at best a generalized knowledge of the problems involved in adoption. This charge is not limited to the adoption context; it is a pervasive criticism of the entire judicial structure: "Those observing today's American legal system or affected by its results seem to be anything but pleased with the way it functions."⁸⁹ It would seem that any measure that would serve to increase the case load would do a disservice to the courts and the parties involved. Moreover, generalized deficiencies in the judicial system are only part of the problem. The adoption process must also contend with a system of economic priorities that unfailingly relegates the problems of the family and of children to a position of "low men on the judicial totem pole."⁹⁰ Thus, while it has been strongly suggested that family problems could be more effectively solved by providing a specialized court aided by social workers and other support personnel, this approach has never been given an opportunity to prove itself. Problems of understaffing represent the greatest obstacle to a meaningful experiment with the concept.⁹¹

The expertise of the adoption agency and the potentiality of an increased workload on the courts is but one side of the story, however. These are compelling reasons for denying the agencies the monopoly over decisionmaking power that they seek. The intelligent use of capable, trained personnel to reach educated but detached determinations of what is best for the child is the promise held out by adoption agencies. Yet this ideal must be reconciled with reality. Adoption agencies are more than charitable organiza-

methods." E. VARON, *RESEARCH ON ADOPTION 2* (1964). See notes 70-71 *supra* and accompanying text.

88. Katz, *The Adoption of Baby Lenore: Problems of Consent and the Role of Lawyers*, 5 *FAMILY L.Q.* 405, 414 (1971).

89. Monroe, *The Urgent Case for American Law Reform: A Judge's Response to a Lawyer's Plea*, 19 *DEPAUL L. REV.* 466 (1970).

90. Polier, *Problems Involving Family and Child*, 66 *COLUM. L. REV.* 305 (1966).

91. *Id.*

tions providing for the welfare of unfortunate children; they are bureaucracies plagued by many of the problems that beset all such institutions. One of the prevailing faults of any bureaucracy is that of growing inflexibility, and adoption agencies have not escaped this tendency. The problem of inflexibility is particularly debilitating in the area of adoption. In order to function smoothly, bureaucracies typically rely on standardized criteria rather than on a case-by-case approach. When dealing with complete human relationships this method is inherently undesirable because in individual situations special needs or special advantages should take absolute precedence in the decisionmaking process.⁹² Obviously, the agencies must have some procedures to ensure smooth operations⁹³ and some equality of treatment, but these procedures should be guidelines rather than rigid rules.⁹⁴ Significant evidence points to the conclusion that adoption agencies are often unnecessarily rigid in making their determinations. A New York study found that the most frequent criticisms leveled at the agencies accused them of inflexibility and overcaution.⁹⁵ Objective evidence has confirmed that many rules followed by adoption agencies are surplusage. When an increase in the numbers of available children necessitated a relaxation of agency rules, agencies found that what they had considered qualifications for adoptive parents were no longer crucial to the child's welfare.⁹⁶ Yet one need only examine the scope of the rules to see the attempt by agencies to quantify the unquantifiable. Beyond the rules that deal with critical issues, such as the mental health of the prospective parents and the child, there are, among others, rules as to maximum age limits of the adoptive parents, requirements as to minimum savings, as to minimum numbers of rooms in the prospective new home,⁹⁷ and as to ethnic and physical

92. See note 19 *supra*.

93. CLARK 642.

94. In *In re Adoption of Tachick*, 60 Wis. 2d 540, 549, 210 N.W.2d 865, 870 (1973), the court stated that "[a]lthough many adoptive agencies have rules of thumb as to age for disqualifying prospective adoptive parents, they should not be conclusive." The court also concluded that the "[p]ersonal qualities of the adoptive parents are of paramount importance; the age, income and social class are far less important. *Id.* at 549 n.7, 210 N.E.2d at 870 n.7. See CLARK 624.

95. FACTS TO BUILD ON—A STUDY OF ADOPTION IN NEW YORK STATE 33 (1962).

96. Hauser, *Adoption and Religious Control*, 54 A.B.A.J. 771 (1968). See also CLARK 604-05.

97. Hauser, *supra* note 96.

matching.⁹⁸ These examples do not demonstrate the true nature of the problem, however. Although the proliferation of rules purports to establish objective standards of adoptive parent suitability, the structure of the adoption industry precludes such a result. Each agency has its own maze of regulations and, more importantly, its own policies of administrative discretion in construing them. Thus, the candidate labeled qualified by one agency may be summarily denied any consideration by another. The existence of the rules, therefore, presents a dual problem—inflexibility and capriciousness.⁹⁹

The current status of the adoption process has made a reexamination of these deficiencies imperative. Despite a recent upsurge in the number of babies,¹⁰⁰ there are again few children available for adoption relative to the number of applications, and certain categories of children, such as white infants are particularly in demand.¹⁰¹ The rush of applications for these desired infants has led to a continuation of the overly rigid rules, which had begun to disappear when babies were plentiful.¹⁰² The agencies have chosen adherence to strict rules and regulations as a means of expediting the handling of applications but at the cost of careful examination of total human relationships. In the absence of judicial scrutiny, it is unlikely that any conscientious review of existing procedures will take place within the agencies. Furthermore, arbitrary agency procedures produce an environment ripe for the growth of illegal techniques, such as extortion, to secure the approval of adoption petitions.¹⁰³

The criticisms levelled at the adoption agencies by both laymen and agency administrators themselves indicate that agencies should not be permitted to be self-policing institutions: "There should be one tribunal in which all points of view can be heard and weighed. This can only be done by allowing the court to override agency objection."¹⁰⁴

98. *In re Bonez*, 50 Misc. 2d 1080, 272 N.Y.S.2d 587 (Family Ct. 1966).

99. *In re Haun*, 31 Ohio App. 2d 63, 66, 286 N.E.2d 478, 480 (1972). BRIELAND, AN EXPERIMENTAL STUDY OF THE SELECTION OF ADOPTIVE PARENTS AT INTAKE (1959), contained a study of caseworkers' reactions to a taped interview of candidate-parents. The study demonstrated substantial disagreement about the fitness of the couple.

100. CLARK 604.

101. Wall St. J., Sept. 14, 1971, at 1, col. 4.

102. Hauser, *supra* note 96.

103. Wall St. J., Sept. 14, 1971, at 1, col. 4.

104. CLARK 624-25.

B. *Success of the Courts in Areas Analogous to Adoption*

To show the ability of the courts to deal with the complex problems raised by adoption it is not sufficient to state that the courts can offer greater detachment than the agencies. Perhaps the best method of demonstrating that courts are capable to handle adoption problems adequately is to demonstrate the success of the courts in dealing with issues of a similar nature.

Probation is one area that requires the same weighing of highly subjective elements as does adoption.¹⁰⁵ Most of the information in the hands of the court in making the final decision is provided by specially trained personnel. Social workers are deeply involved in the probation system. After a defendant has been convicted, his case is assigned to a social worker, who makes a study and submits a report with recommendations to the judge as to probation or institutionalization. The caseworker considers a variety of factors including the crime committed, psychiatric evidence, the past record and personality of the individual. The court receives the report and reviews the information presented, and finally determines whether to imprison or grant probation. The judge's decision controls.¹⁰⁶

The suggestion could be made that the social workers are so expert that they should have sole control of the process but in the field of probation evidence demonstrates that the social worker is not infallible. In 63.3 percent of the cases where the courts overrode the caseworkers' recommendation of imprisonment, the probations were successful. This compares with only a 73 percent record of success among those initially recommended for probation by the social worker.¹⁰⁷ These statistics indicate overcaution on the part of the social workers and suggest that in a significant percentage of cases the courts' failure to accept the evaluations of the social workers was justified. The success of probation as a means of rehabilitating criminals is perhaps questionable, but the record of the courts in using their independent judgment to deal with marginal cases compares favorably with the record of those specifically trained to deal with that particular work.

An area more closely analogous to adoption is the judicial disposition of custody issues pursuant to divorce decrees. In most cus-

105. See generally PROBATION AND PAROLE: SELECTED READINGS (R. Carter & L. Wilkins eds. 1970).

106. Kaufman, *Sentencing the Judge's Problem*, in *id.*, at 158.

107. Carter & Wilkins, *Some Factors in Sentencing Policy*, in PROBATION AND PAROLE: SELECTED READINGS 146 (R. Carter & L. Wilkins eds. 1970).

tody contests the court is dealing with the child's welfare much as in adoption, albeit on a conditional basis.¹⁰⁸ The courts displayed no hesitation in handling these matters, and there is scant authority that they should not or cannot deal with them. The courts are the final arbiters of custody matters. Moreover, many statutes direct the courts to make their decisions on the basis of an examination of the best interests of the child, the preferable test in the resolution of adoption issues.¹⁰⁹

The large number of custody proceedings has given courts extensive opportunity to exercise their creative talents in framing decrees. In *Woicek v. Woicek*,¹¹⁰ for example, the court was confronted with a divorce that greatly upset the children involved. The court's decree resolved the custody issue by splitting the custody and vacation time between the parents and providing that the children attend boarding school.¹¹¹

Of greatest importance in analyzing the ability of courts to review the determinations of adoption agencies is the power of the courts to grant adoptions directly when the agency does not have custody. The court itself may have custody, or the natural parents may retain custody until the adoption proceeding, but in any such case the role of the agency is limited to making an investigation, report, and recommendation.¹¹² On the basis of this evidence, along with any other evidence that the parties may present, the court makes a final decision on the merits. The court places considerable reliance on the agency recommendation because of the expertise of caseworkers. However, since the agency does not have custody, all the parties may present evidence to the court in the case of an adverse recommendation, and the court is fully informed of the facts and makes its decision accordingly. Ultimately, the judge has sole discretion regardless of agency recommendations. The fact that the judge must apply the nebulous standard of the best interests of the child does not appear to have been an insurmountable obstacle.

108. In custody matters, the judicial disposition may be regarded as temporary since the court retains jurisdiction over the parties for the purpose of altering custody arrangements in the event of changed circumstances. *E.g.*, MICH. COMP. LAWS ANN. § 722.27 (Cum. Supp. 1974).

109. *E.g.*, ME. REV. STAT. ANN. tit. 19, § 214 (Cum. Supp. 1974); MICH. COMP. LAWS ANN. § 722.25 (Cum. Supp. 1974); MO. STAT. ANN. § 452.375 (Cum. Supp. 1975); OHIO R. CIV. P. 75(P). For an analysis of the role the courts should play in child custody proceedings, see Note, 25 CASE W. RES. L. REV. 347 (1975).

110. 66 Misc. 2d 357, 321 N.Y.S.2d 518 (Sup. Ct. 1971).

111. The result is applauded in 1 FAMILY LAW COMMENTATOR 2, 3 (1972).

112. CLARK 634.

Confidence in the ability of the courts to handle these proceedings and the wide experience of the courts in these parallel areas strongly suggest that the judiciary is well able to cope with the burden of reviewing the decisions of adoption agencies. There is, in fact, a growing sentiment that courts should undertake an even greater role in overseeing parent-child relationships as in instances of abuse or neglect.¹¹³ This, in itself, is evidence of a faith in the capability of courts to operate effectively in this general area of the law. The lack of specific expertise in probation and custody proceedings has not prevented effective judicial treatment of the problems. The courts use the social workers' reports and recommendations extensively to provide a broader understanding of the issues and facts involved in each case. Unlike the social workers themselves, the courts are able to evaluate these reports with greater freedom from rules and accepted procedures and to examine the subjective factors involved. The opportunity for judicial scrutiny means that problems are exposed in a second, impartial forum.

IV. THE CONSTITUTIONAL DIMENSION

Theoretically, the most significant questions that are aired in the judicial forum are those that touch upon rights of constitutional dignity. Thus, perhaps the most persuasive argument for permitting judicial review of adoption agency determinations lies in the possibility that constitutional rights may be at stake in the adoption process. Constitutional issues arise on two levels: first, does the failure to provide judicial review of agency determinations violate due process; and second, is there a need to provide a forum for substantive constitutional issues raised by agency determinations in order to decide whether state or agency regulations create classifications vulnerable to attack under the free exercise or equal protection clauses. Since an exhaustive treatment of the constitutional dimension of the adoption process is beyond the scope of this Note, this discussion merely raises the constitutional issues in order to indicate the necessity of reevaluating the role of the adoption agencies.

A. *State Action*

The threshold issue in any claim that a constitutional right has been violated is whether state action has precipitated the alleged infringement. At the outset, there is no problem in finding state ac-

113. Grumet, *The Plaintive Plaintiffs: Victims of the Battered Child Syndrome*, 4 FAMILY L.Q. 296, 313-17 (1970).

tion where an agency has direct ties with formal state operations, such as departments of welfare. The "formal operation" of a state agency is deemed to constitute "the most obvious instance" of state action.¹¹⁴ On the other hand, there may be a substantial question whether the operations of private adoption agencies constitute state action. Private agencies, of course, are not automatically eliminated from consideration under state action. The Supreme Court in *United States v. Guest*¹¹⁵ expressly reserved the possibility that a nominally private institution could perform activities that constitute state action: "[T]he involvement of the state need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral"¹¹⁶

Although there are many avenues to finding state action, four routes seem to predominate: first, state financing; second, significant state regulation; third, the performance of a public function by a private party; and fourth, a weighing of all incidents of state involvement.¹¹⁷ Since it includes the other three, the fourth possibility is perhaps the most persuasive approach in the adoption agency situation. First, adoption agencies as charitable organizations qualify for tax exemption. Though not dispositive of significant state involvement, exempt status does suggest a kind of state financing.¹¹⁸ Second, in terms of significant regulation, the state usually places many restrictions on the operation of adoption agencies. For instance, the relevant Ohio statute¹¹⁹ provides for a yearly evaluation of the agency's performance, and the Department of Welfare is authorized to inquire into children's care and compliance with the Department rules and regulations.¹²⁰ Third, there is considerable force

114. Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1070 (1969).

115. 383 U.S. 745 (1965).

116. *Id.* at 755.

117. *Developments in the Law*, *supra* note 114, at 1070-71.

118. *McGlotten v. Connally*, 338 F. Supp. 448, 456, 462 (D.D.C. 1972), states the proposition that tax exempt status is equivalent to a government subsidy. The government has granted exemptions to charitable organizations to encourage their activities because these organizations perform functions the government might otherwise have to perform. However, tax exempt status alone is typically insufficient to sustain a claim of state action. See *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), and note particularly the concurring opinion of Justice Brennan, *id.* at 680. See also *Jackson v. Statler Foundation*, 496 F.2d 623 (2d Cir. 1974).

119. OHIO REV. CODE ANN. § 5103.03 (Page 1970).

120. This indicates a degree of governmental involvement well beyond that

in the concept that private agencies have been delegated by the state to perform a public function.¹²¹ Although the question is far from settled, there are indications that the state holds the primary responsibility for caring for children when the natural parents are unable to provide a suitable family environment and that private agencies have become the chosen vehicle for fulfilling this responsibility.¹²² The involvement of the agencies with functions of child care other than adoption demonstrates that agency resources are used to carry out far-ranging welfare services for children. In virtually all states, the agencies provide investigation reports to the courts when the agency is not involved in the litigation as a party,¹²³ and the agencies frequently provide continuing care for difficult-to-place children. In these respects the operations of a private adoption agency closely parallel the workings of a private hospital, an entity a number of courts have already identified as a conduit of state action.¹²⁴ A court taking all of the characteristics of charitable child-placing agencies into account, therefore, might well conclude that their determinations constitute state action.¹²⁵

B. *Rights Vindicated by Judicial Review*

To build a constitutional challenge, it is necessary to relate state

of a mere licensing function, which is not, in all probability, sufficient to trigger the state action theory. See *Moose Lodge v. Irvis*, 407 U.S. 163 (1972), in which the court held that the mere issuance of a state liquor license to a private club did not place the activities of that club in the realm of state action. *Accord*, *Jackson v. Metropolitan Edison Co.*, 95 S. Ct. 449 (1974).

121. See, e.g., *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Smith v. Allwright*, 321 U.S. 649 (1944). While the Supreme Court has appeared to take a restrictive view of public function recently in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and *Jackson v. Metropolitan Edison Co.*, 95 S. Ct. 449 (1974), there is language in *Jackson* which suggests the Court would be more receptive to finding state action in the context of adoptions. In declining to find that a utility performs a public function for state action purposes, Justice Rehnquist noted, "If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one." 95 S. Ct. at 454.

122. See, e.g., *In re Boney*, 50 Misc. 2d 1080, 272 N.Y.S.2d 587 (Family Ct. 1966); notes 58-60 *supra* and accompanying text.

123. CLARK 616-17; see, e.g., ARK. STAT. ANN. § 56-105 (1971); CAL. CIV. CODE § 226.2 (West Cum. Supp. 1974); HAWAII REV. STAT. tit. 31, ch. 578-8 (Supp. 1974).

124. *Silver v. Castle Memorial Hosp.*, 53 Hawaii 475, 497 P.2d 564, *cert. denied*, 409 U.S. 1048 (1972); *Greisman v. Newcomb Hosp.*, 40 N.J. 389, 192 A.2d 817 (1963); Southwick, *Hospital Medical Staff Privileges*, 18 DEPAUL L. REV. 655, 659 (1969); Comment, 39 MINN. L. REV. 567, 568 n.6 (1955).

125. Southwick, *supra* note 124, at 669.

action to a specific constitutionally protected right. Courts have raised the question whether denial of judicial review of agency determinations violates a constitutional right. But the courts have been unable to articulate fully their vague feelings that constitutional issues are involved and have, instead, resorted to unspecific references to unconstitutional effects flowing from the lack of a process of judicial review:

If Michigan's adoption statute . . . confers on an agency the absolute and judicially unreviewable power to decide who shall enjoy custody of the child and whether, by whom and when the child may be adopted, subject only to confirmation by the court, there would arise serious constitutional questions under both due process and equal protection clauses.¹²⁶

In order to pursue a due process attack on an adoption procedure that does not provide for judicial review, the petitioners for adoption must establish that they have been deprived of a clearly defined right by a no-review procedure. There does not appear to be any constitutional right to custody of the adopted child. However, since the child lives with the new parents conditionally before any final action on the adoption petition or pursuant to a foster-parent arrangement, rights may arise sufficient to fall within the ambit of due process. To achieve this result courts have typically attempted to draw an analogy between the right to adopt a child and traditional property rights.¹²⁷ According to this view, the rights vest during the period in which the child lives with the adoptive parents under a conditional placement or foster-parent program:

A realistic appraisal of the situation compels us to recognize that persons such as respondents who have done what they have done for this child, must be assumed to have an affection and attachment for her at least equally important to property rights. Viewed in this light, there certainly have intervened 'vested rights' and respondents have in reliance on representations made, placed themselves in a different position. . . .¹²⁸

A California court, however, did not feel constrained to draw this analogy, reasoning that such rights are due constitutional protection on their own independent of any property implications.¹²⁹

126. *In re Mark T.*, 8 Mich. App. 122, 144, 154 N.W.2d 27, 38 (1967).

127. *See, e.g., In re Adoption of D—*, 122 Utah, 525, 252 P.2d 223 (1953).

128. *Id.* at 535-36, 252 P.2d at 229.

129. *C.V.C. v. Superior Court*, 29 Cal. App. 3d 909, 106 Cal. Rptr. 123 (Ct. App. 1973).

This view approaches the final decree of adoption as the natural result of the bonds that form while the adoptive parents have interim custody.¹³⁰

Once the applicability of due process protections is established, the final question becomes whether adoption agency determinations fulfill due process requirements. Because of the closed nature of agency operations, it may be doubted whether agency determinations procedures can meet even the initial test of a "fair hearing."¹³¹ An agency can hardly be "an impartial decision maker."¹³² There is no opportunity for the petitioners to present their case "in a meaningful manner,"¹³³ to have representation of counsel in responding to the agency's position,¹³⁴ or to receive an indication of the reasons for agency action.¹³⁵

At the same time, it should be noted that the exact boundaries of due process are established by a balancing of private and public or governmental interests.¹³⁶ The right or privilege deprived by the process must be a significant one; the burdens placed on the government by the use of a more extended process must not be unusually onerous. The decision to reject an adoption petition is unquestionably a critical one; moreover, time is not so essential to the process that a judicial review would overburden the state, nor has the state expended any funds up to that point in settling the matter. To discover the specific demands of due process in an adop-

130. Gain of a child for adoption fulfills the prospective parents' most cherished hopes. The event marks the onset of a close and meaningful relationship. The emotional investment does not await the ultimate decree of adoption. Love and mutual dependence set in ahead of official cachets administrative or judicial. The placement initiates the "'closest conceivable counterpart of the relationship of parent and child.'" To characterize enforced removal of the child as a "grievous loss" is to state the obvious.

Id. at 916, 106 Cal. Rptr. at 128 (footnotes omitted); see also *James v. Linden*, [1968-1971 Transfer Binder] CCH POVERTY L. REP. ¶ 9938, at 11,009 (D. Conn. 1969).

131. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

132. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1968).

133. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

134. *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1968).

135. See *CLARK* 641 n.21. The requirement of disclosure of the reasons for the decision is set forth in *Goldberg*, 397 U.S. at 271.

136. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961): "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

tion situation, one is forced to resort to analogous situations. Fortunately, the case of *Goldberg v. Kelly*¹³⁷ presents a fairly close parallel. In *Goldberg*, the Supreme Court held that the termination of public assistance payments without an evidentiary hearing violated due process. The critical factor in the *Goldberg* decision, as in the adoption situation, is that the determination of the benefits before a hearing strikes at one who may in reality be eligible for those benefits. The Court specifically stated the nature of the proceedings that due process required:

In the present context, these [due process] principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination and an effective opportunity to defend by confronting an adverse witness and by presenting his own arguments and evidence orally. These rights are important . . . where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.¹³⁸

According to the *Goldberg* test, then, the failure to provide for judicial review of adoption agency decisions cannot pass constitutional muster.

C. *Equal Protection and Free Exercise of Religion*

The failure of the judiciary to review agency determinations is also objectionable because such a procedure avoids the necessity in many instances of confronting substantive constitutional issues that arise in the process of agency consideration of adoption petitions. Statutes and agency regulations often distinguish among classes of individuals as to their fitness to be adoptive parents.¹³⁹ Restrictions may be based on age, health, and income. In all of these cases, whether the classification deserves the label "suspect" is not clear.¹⁴⁰ Nor is it clear that the right infringed by the classification, the adoption of the child, is "fundamental." Finally, the question remains unanswered whether the state interest vindicated by the classification would be sufficient to sustain the classification against equal protection attack. Moreover, all of these uncertainties are magnified

137. 397 U.S. 254 (1968).

138. *Id.* at 267-68.

139. See notes 94-99 *supra* and accompanying text.

140. Age and health classifications have not yet been confronted by the United States Supreme Court. Wealth has been treated in *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 18-28 (1972), and assigned an intermediate position in the Burger Court's equal protection scheme. One can speculate from the new model that few, if any, classifications will henceforth be labelled "suspect". See note 141 *infra*.

by the changes in the equal protection paradigm of the Supreme Court. The new sliding scale approach would seem to necessitate a reevaluation of many equal protection issues.¹⁴¹

Even in areas where the Court has purportedly delivered definitive decisions, doubts remain. Racial and religious qualifications are prime examples. Statutes prohibiting interracial adoptions have consistently been declared unconstitutional.¹⁴² Nonetheless, a number of states still have statutes that make race a relevant consideration in the decision to approve or reject a petition. The problem with such statutes is plain. Agencies are already bound to a formidable scheme of regulations.¹⁴³ With the shortage of children for adoption,¹⁴⁴ agencies might tend to interpret the statutes as justifying a racially-biased adoption decision.¹⁴⁵ Indeed, there is a great deal of opposition by adoption agency officials to placing children across racial lines, even when the alternative is that the child remain without a family.¹⁴⁶ Moreover, there are indications that the technique of racial matching has stretched far beyond its logical objectives. The case of *In re Boney*¹⁴⁷ is illustrative: "We have explored the use of an adoptive family from our agency for Ellen, but they [the caseworkers] felt that although she is socially appealing and intellectually curious, her darker skin tone would create conflicts."¹⁴⁸ Matching statutes, therefore may well be vehicles for enforcing unconstitutional policies.

Similar problems arise with religious matching. Virtually all states have statutes requiring religious matching of adoptive parents

141. See generally Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

142. The last such statutes were in Texas and Louisiana. They were declared unconstitutional in *In re Adoption of Gomez*, 424 S.W.2d 656 (Tex. Civ. App. 1967), and in *Compos v. McKeithan*, 341 F. Supp. 264 (E.D. La. 1972).

143. See notes 94-99 *supra* and accompanying text.

144. See note 4 *supra*.

145. Nevertheless, if it can be shown that race alone is looked to as a basis for differentiation (and that all other factors are largely ignored), the argument is tenable that these statutes are, in effect, applied like those which expressly prohibit interracial adoption, and are therefore, like them, of doubtful constitutionality.

Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFFALO L. REV. 303, 341 (1967).

146. Polier, *Problems Involving Family and Child*, 66 COLUM. L. REV. 305 (1966).

147. 50 Misc. 2d 1080, 272 N.Y.S.2d 587 (Family Ct. 1966).

148. *Id.* at 1088, 272 N.Y.S.2d at 595.

and children "whenever practicable."¹⁴⁹ Challenges to these statutes are typically based on the free exercise and establishment of religion clauses of the first amendment. It is argued that children from small religious groups would have a difficult time being adopted, and certainly adoptive parents from such groups or atheistic adoptive parents would find it nearly impossible to adopt a child. There is also a basis for an equal protection attack. By insisting on a family with an established religion the agencies, and thus the states, are favoring certain religions over other religions and over nonreligion.¹⁵⁰

It may be argued that religious matching is beneficial to the development of the child. This position is defensible when a child has developed an attachment to a particular creed, but the value of matching when the child is newborn and incapable of forming intelligent religious attachments is questionable. In all of these situations, it must be questioned whether judicial abstention is proper. If these regulations are unconstitutional or unconstitutionally applied, it is the duty of the court to halt their operation.

V. CONCLUSION

The law on judicial review of adoption agencies is in a state of flux. There is a consensus that the adoption decision should be founded on the welfare of the child. However, courts must often contend with both legislative language that elevates the decisionmaking processes of the agency above the interest of the child and legal fictions that present the adoption agency as the representative and benefactor of the child. In the resulting interplay of legislative and judicial opinion, the underlying purpose of adoption statutes has in some instances been lost. The expanding influence of the agencies with the attendant risk of arbitrary actions makes a resolution of the issue of judicial review of increasing importance. The judiciary is the logical arbiter of the final adoption decision. It possesses the ability to confront the human issues presented by adoption petitions and the competence to adjudicate the constitutional issues that may arise. The interposition of the impartial judicial tribunal assures that the adoption agency will serve its proper function by assisting the state in reaching equitable decisions on adoption petitions.

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149. See CLARK 648.

150. Note, *Constitutionality of Mandatory Religious Requirements in Child Care*, 64 YALE L.J. 772, 779-80 (1955).